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OCT 19 2007

**CONFIDENTIAL**

FD 35085

**CONFIDENTIAL MATERIAL  
SUBJECT TO A REQUEST FOR A PROTECTIVE ORDER**

**SERVICE AGREEMENT**

220457

This Service Agreement ("Agreement") is entered into this \_\_\_ day of October, 2007 (the "Effective Date") by and between Kansas City Transportation Services, LLC ("KCTL") and Kaw River Railroad, Inc. ("Kaw River").

**WHEREAS**, KCTL is a common carrier by railroad duly authorized by the U.S. Surface Transportation Board to provide railroad service to the public on and over certain railroad tracks located in Kansas City, Kansas and Kansas City, Missouri and identified on Attachment A hereto in red ("the Line"); and

**WHEREAS**, KCTL and Kaw River are parties to a certain "SWITCHING AND MAINTENANCE SERVICES AGREEMENT" effective March 1, 2006 ("Pre-Existing Agreement") and they desire to terminate that Agreement and enter into a new agreement for Kaw River to provide certain services to KCTL; and

**WHEREAS**, the parties intend that KCTL will retain full common carrier rights and obligations on the Line with respect to the shipping public; and

**WHEREAS**, the parties intend that Kaw River shall perform limited services on behalf of KCTL as agent for KCTL and shall not become a common carrier by rail as a result of this Agreement;

**NOW THEREFORE**, in consideration of the mutual promises set forth below and intending to be bound, the parties agree as follows:

1. **Appointment of Agent.**

KCTL hereby appoints Kaw River as its agent to provide railroad-related services in support of KCTL's common carrier responsibilities, where KCTL appears in the routing on waybills, bills of lading and the accounts maintained under the rules of the American Association of Railroads. Kaw River shall perform such services in the name of and for the benefit of KCTL, and shall not offer, hold itself out as offering or provide any services in its own name or for its own account.

2. **KCTL Responsibilities.**

A. KCTL retains and shall be responsible to the shipping public for providing railroad services on and over the Line in accordance with the provisions of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§10101 et seq.

B. KCTL shall quote all rates, negotiate all transportation and related contracts, provide and perform all sales and marketing functions, and conduct all other commercial activities and relationships with shippers on the Line and with interchanging and connecting railroads.

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C. KCTL shall develop and maintain a service and operating plan and compliance specifications to provide local switching service to all shippers who request rail transportation service on and over the Line, and shall provide interchange service with all railroad common carriers connecting to the Line.

D. KCTL, or its affiliate, shall provide dispatching services over the Line and shall be responsible for the orderly and safe authorization of all train movements over the Line.

E. KCTL shall be responsible for the investigation, settlement and payment of all freight loss or damage claims and claims concerning the adequacy of rail transportation service on the Line.

F. KCTL shall maintain, repair and rehabilitate the track, roadbed and signals on the Line to the level and condition on the effective date of this Agreement, provided however, that KCTL may elect to subcontract some or all of such work;

G. KCTL shall be responsible for supplying railcars for Shippers on the Line, and KCTL shall be responsible for payment of all car hire and mileage charges applicable to such cars.

H. KCTL shall provide direction and control of all Kaw River activities on and about the Line at all times.

3. Kaw River Responsibilities.

A. Kaw River shall supply locomotives and crews to execute KCTL's service and operating plan as it may be determined by KCTL from time to time. Locomotives shall display the KCTL logo and shall be painted according to KCTL paint schemes.

B. Kaw River shall report the pick-up and delivery of cars into the railroad industry car movement system on behalf of KCTL. All cars will be reported as being in the account of KCTL, and KCTL will be responsible for payment of car hire and mileage for cars while on the Line.

C. Kaw River shall perform rail car switching on behalf of and in the name of KCTL, under the direction and control of KCTL's General Manager and KCTL's dispatchers, and in accordance with the GCOR rules, AAR Interchange Rules, applicable government regulations and industry practices. Except as otherwise provided in Paragraph 5, all revenues collected for all transportation, accessorial and incidental services including demurrage charges shall be retained by KCTL.

4. Use of Facilities. The parties recognize and agree that Kaw River's work under this Agreement is for the benefit of KCTL and in furtherance of KCTL's common carrier rights and obligations. Nothing in this Agreement is intended to grant Kaw River any rights or obligations to provide rail service to the shipping public except as agent for and on behalf of KCTL. Kaw

River shall take no action that would unreasonably interfere with the use of the Line by KCTL, Kansas City Terminal Railroad Company or the Terminal's owners, or create any lien or other interest in the Line.

5. Compensation.

A. Kaw River's sole compensation for performing services under this Agreement shall be:

1. \$150.00 per loaded car, which shall include, industry switching, transfer work, blocking and any other services provided for in this Agreement; and
2. \$75 per car for each car that is delivered to KCTL empty and is subsequently interchanged to another railroad without having been loaded; and
3. Kaw River shall retain all AAR car repair revenue.

B. Kaw River shall invoice KCTL monthly for sums due under this Agreement for the previous month. KCTL shall pay amounts due within twenty (20) days of receipt of such invoices.

6. Inspection of Records. Kaw River shall keep complete and accurate records of all services provided under this Agreement. So much of the books, accounts and records of Kaw River as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection and audit by proper officers and agents of KCTL Kansas City Terminal Railroad Company and its owner(s).

7. Insurance. Kaw River shall at all times covered by this Agreement maintain at its sole cost and expense insurance in at least the kinds and amounts set forth on the Exhibit \_\_ attached hereto and incorporated by reference herein. KCTL shall be named as an additional insured and a certificate of insurance reflecting such coverages shall be provided to KCTL prior to commencing work under this Agreement, and shall be satisfactory to KCTL with respect to coverage, amount, and character of insurance companies. The insurance certificate shall contain a clause that provides: "In the event any of the above policies are materially altered, changed or canceled, KCTL will be furnished 30 days advance notice in writing."

8. Liability. Each party shall be responsible for its own failure to perform this Agreement and for the negligence or intentional misconduct of its own employees, agents and representatives. Each party shall indemnify, hold harmless and defend the other party from any claims or losses for which the first party is responsible under this Agreement.

9. Arbitration.

A. In the event any disagreement shall arise between the Parties hereto as to the interpretation or the application of the provisions of the Agreement, then, upon the written request of either Party, in which request the issue in dispute is set forth, the dispute shall be finally resolved by binding arbitration administered by the American Arbitration Association ("AAA") under the AAA Commercial Arbitration Rules (the "Rules") then in force, to the extent such Rules are not inconsistent with the provisions of this Agreement.

B. If the Parties involved in such dispute are able to agree upon a single arbitrator experienced in matters of the character in dispute within (30) days after the Party requesting arbitration shall notify in writing the other Party of such dispute, the dispute shall be submitted to such single arbitrator.

C. If a single arbitrator cannot be agreed upon before the expiration of such period of thirty (30) days, the dispute shall be submitted to three arbitrators experienced in matters of the character in dispute to be appointed as follows: The party requesting arbitration shall select an arbitrator and give written notice thereof to the other Party. Such other Party shall select an arbitrator within thirty (30) days after receipt of such notice and give written notice thereof to the Party requesting arbitration. If within the time specified a Party fails to nominate its party-appointed arbitrator or the two party-appointed arbitrators fail to nominate the third arbitrator, either party may request the AAA to make the appointment according to the Rules. If any nominated arbitrator is not appointed, declines, resigns, becomes incapacitated, or otherwise refuses or fails to serve or to continue to serve as an arbitrator, the Party or arbitrators entitled to appoint that arbitrator shall promptly nominate a successor. If the arbitrators are unable to agree on a replacement third arbitrator, then the AAA shall make the appointment according to the Rules.

D. The arbitrator or arbitrators, having taken and subscribed an oath before a person authorized by law to administer oaths to the effect that he or they will try to impartially and justly decide the matter or controversy according to the best of his or their ability, which oath shall be filled to his or their decision, shall, as soon as practicable after his or their decision, shall, as soon as practicable after his or their selection, hear the dispute or disputes submitted and shall give to each of the Parties reasonable notice of the time and place of such hearing. The hearing shall be conducted at the time and place designated as aforesaid, and, after hearing both Parties and taking such testimony or making such investigation as he or they may deem necessary. The arbitration award shall be in writing, shall give reasons for the decisions reached and shall be signed and dated by the arbitrator(s), and a copy of the award shall be delivered to each of the Parties. The Party against which an award assesses a monetary obligation or enters an injunctive or mandatory order shall pay that obligation or comply with that order on or before the 30<sup>th</sup> calendar day following the receipt of the award or by such other date as the award may provide. The award shall be final and binding on the parties and may be confirmed in, and judgment upon the award entered by, any court having jurisdiction over the Parties.

E. Upon the presentation of such decision, each Party shall immediately make such changes in the conduct of its business or such payments or restitution, as the case may be, as by such decision is required of it.

F. Each Party to the arbitration shall pay the compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits and counsels. The compensation, cost and expense of the single arbitrator or the third arbitrator in the board of arbitrators shall be paid in equal shares by all Parties to the arbitration.

G. Until a decision is made upon any dispute submitted to arbitration, the business, settlements and payments to be transacted and made under this Agreement shall continue to be transacted and made in the manner and form existing prior to the rise of such dispute.

H. The parties hereto acknowledge and agree that the foregoing arbitration provisions shall not in any way effect, supersede or diminish the rights of KCTL or Kaw River to exercise their rights or remedies, including the right to terminate this Agreement, in accordance with the provisions of Paragraphs 11 or 12 below, as applicable.

10. Confidentiality. Kaw River understands that by virtue of its performance under this Agreement, it will receive proprietary and confidential business information. Kaw River will keep all confidential and proprietary information confidential and will not disclose any such information to any third party with the prior consent of KCTL. If Kaw River is or may be ordered by valid court or administrative order to divulge confidential information, Kaw River will notify KCTL prior to disclosure to allow KCTL to protect its own interests.

11. Default.

A. If KCTL shall fail to pay any sum payable by it hereunder on the date when same shall be due or shall fail to perform or comply with any other covenant or condition by it to be performed or complied with under this Agreement and such default shall continue for a period of sixty (60) days after written demand for the cure of such non-payment, non-performance or non-compliance shall have been made upon KCTL by Kaw River, then Kaw River may, at its election, terminate this Agreement upon giving notice in writing of such election to KCTL. Upon KCTL's receipt of such notice of termination, this Agreement shall terminate and all rights and obligations of KCTL under the Agreement shall cease. Any such termination shall not relieve KCTL from any liability which may have occurred prior to or at the date of such termination or deprive Kaw River of its rights to enforce any such liability, or of the benefits of any covenants or obligations in this Agreement for KCTL to indemnify Kaw River or hold it harmless. A waiver by Kaw River of the breach by KCTL of any payment, covenant or condition of the Agreement shall not impair the right of Kaw River to avail itself of any subsequent breach thereof.

B.If Kaw River shall fail to timely and properly perform its duties and obligations under this Agreement or fails to perform such duties and obligations in accordance with such performance standards as may be required by KCTL pursuant to this Agreement or KCTL's operating plan (as it is in effect from time to time) and such failure or breach continues for a



period of thirty (30) days or if Kaw River fails to perform or comply with any other covenants or conditions of this Agreement, or should Kaw River otherwise breach any of terms or conditions of this Agreement after written demand for the cure of such failure or breach, then, in either such event, KCTL may, at its election, terminate this Agreement upon giving notice in writing of such election to Kaw River. Upon Kaw River's receipt of such notice of termination, this Agreement shall terminate and all rights and obligations of Kaw River hereunder shall cease. Any such termination shall not relieve Kaw River from any liability which may have occurred prior to or at the date of such termination or any liability resulting from or in connection with said breach or failure of Kaw River to perform this Agreement for the entire term of the Agreement or deprive KCTL or others of the right to enforce any such liability, or of the benefits of any covenants or obligations in this Agreement on the part of Kaw River to indemnify and/or hold harmless KCTL or others. A waiver by KCTL of the breach by Kaw River of any covenant or condition of the Agreement shall not impair the right of KCTL to avail itself of any subsequent breach thereof.

C. If Kaw River shall fail to timely and properly perform its duties and obligations under this Agreement or fails to perform such rail car switching duties and obligations in accordance with KCTL's operating plan (as it is in effect from time to time) and such failure or breach should cause an interruption of Kaw River's railcar switching services and such failure continues for a period of five (5) days after written demand for the cure of such non-performance or non-compliance, KCTL shall have the right, at its sole discretion, exercisable at KCTL's option, in any order, and following twenty-four (24) hours' advance written notice to Kaw River describing Kaw River's failure or breach, to:

(i) allow Kaw River to continue performing the railcar switching services under this Agreement, but upon delivery of the default notice to Kaw River, enforce against and collect from Kaw River liquidated damages in the amount of \$1,000.00 per day until such time as Kaw River's failure or breach is cured in KCTL's reasonable opinion or until such time as Kaw River provides KCTL with such evidence, sufficient in KCTL's reasonable opinion, that Kaw River is ready to timely and properly perform the switching services without any further failures or breaches; or,

(ii) immediately take over the performance of (or hire a replacement agent to take over the performance of) any portion of or all of the railcar switching duties until such time as Kaw River's failure or breach is cured in KCTL's reasonable opinion or until such time as Kaw River provides KCTL with such evidence, sufficient in KCTL's reasonable opinion, that Kaw River is ready to resume the timely and proper performance of the railcar switching services without any further failures or breaches. In the event that KCTL exercises its right to take over the railcar switching activities under this section, then Kaw River shall make available to KCTL (or its replacement agent) and allow KCTL (or its designated agent) to use, at no cost or expense to KCTL or its designated replacement agent, any or all of the equipment (including locomotives and switch engines), materials and supplies that Kaw River uses, has supplied or has in its possession for use in connection with its performance of the railcar switching activities. Any cost incurred by KCT to perform or cause the performance of such railcar switching services shall be at the cost of Kaw River and shall be reimbursed by Kaw River to KCTL timely upon demand.

D. In addition to the remedies set forth in subsection (i) and (ii) above, in the event Kaw River's failure or breach continue for a period of thirty (30) days after written demand for performance or compliance, then KCTL may terminate this Agreement upon giving notice in writing of such election to Kaw River, which notice may be sent electronically or by express mail to Kaw River. Upon receipt of the notice, this Agreement shall be terminated and all rights and obligations of Kaw River shall cease twenty-four (24) hours after notice of termination is sent by KCTL. Any such termination shall not relieve Kaw River from any liability which may have occurred prior to or at the date of such termination, shall not relive Kaw River for any liability resulting from or in connection with said breach or failure of Kaw River to perform this Agreement for the entire term of the Agreement or deprive KCTL or others of the right to enforce any such liability, or of the benefits of any covenants or obligations in this Agreement on the part of Kaw River to indemnify and/or hold harmless KCTL or others.

E. A "Force Majeure Event" shall mean any or all of the following events or occurrences and the effects thereof: acts of God or the public enemy, flood, earthquake, storm, cyclone, tornado, hurricane, rail embargo, rail tariff or interruption of Class I rail service, lightning, fire, explosion, epidemic, war, embargoes, riot or civil disturbances, strikes or other labor disputes, sabotage, expropriation, confiscation or requisitioning of facilities, orders or temporary or permanent injunctions of any duly constituted court of competent jurisdiction and any other matter or event which is beyond the control of KCTL or Kaw River and which the relevant party could not take reasonable measures to prevent.

Where either KCTL or Kaw River is unable, wholly or in part, by reason of a Force Majeure Event to carry out any obligation under this agreement and gives the other party immediate notice of the Force Majeure Event; and uses all reasonable diligence to remove the Force Majeure Event as quickly as possible, then that obligation is suspended so far as it is affected by the Force Majeure Event during its continuance. Notwithstanding the foregoing, Kaw River shall provide the services required of it hereunder during any labor dispute involving Kaw River employees.

## **12. Effective Date, Term and Termination.**

A. The Pre-Existing Agreement shall be deemed terminated and this Agreement shall be effective as of the Effective Date, provided however that any claims or rights that accrued to either party under the Pre-Existing Agreement prior to the Effective Date shall not be affected by termination of such agreement. The term of this Agreement shall be three (3) years from the Effective Date, at which time it shall terminate. Provided however, the parties shall negotiate in good faith for an extension of this Agreement or a new agreement after termination, but nothing herein requires either party to agree to any extension or new agreement.

B. Notwithstanding the foregoing, KCTL shall have the right to terminate this Agreement at any time if, in its sole discretion it reasonably determines that the service provided by Kaw River is inadequate and does not meet the requirements of this Agreement and Kaw River fails to cure or has failed to take substantial steps to cure the failure in service after the applicable cure periods set forth in paragraph 11.

C. Should the lease to KCTL from the Kansas City Southern Railway Company of trackage in Kansas City Kansas and Kansas City, Missouri, shown in blue on Exhibit A to the Pre-Existing Agreement, (the "KCS Lease") expire or be terminated for any reason, Kaw River's rights and obligations concerning activities on the portion of the Lines covered by that lease shall also terminate. Should the KCS Lease expire or terminate for reasons other than Kaw River's failure to perform its services or any other default under this Agreement, the parties shall negotiate in good faith to modify the compensation or other terms of this Agreement to reflect any changed economics resulting from such expiration or termination. If the parties are unable to renegotiate terms within 60 days from the effective date of such expiration or termination, then either party may terminate this Agreement by providing the other party hereto 60 days advance written notice of termination.

D. Any partial or complete termination or expiration of this Agreement shall not, however, relieve Kaw River from any liability which may have attached or accrued prior to the effective time of such expiration or termination or any liability resulting from or in connection with any breach or failure of Kaw River to perform this Agreement for the entire term of the Agreement or deprive KCTL of the right to enforce any accrued liability or obligations of Kaw River under this Agreement.

13. Independent Contractor. Kaw River is an independent contractor, providing its own tools, equipment and employees to perform services under this Agreement. Kaw River's employees shall not be considered to be the employees of KCTL for any purpose whatsoever. Kaw River shall be solely responsible for all wages, benefits, employment taxes, workplace injuries and other incidents of employment due or claimed to be due to Kaw River's employees with respect to services provided under this Agreement.

14. Service of Notices. Any notice herein provided for shall be in writing and deemed to be properly served if deposited in the United States mail, postage prepaid, addressed to the party as follows, unless notice of change of address has been previously given in writing.

If to KCTL:	Kansas City Transportation Company LLC c/o Kansas City Terminal Railway company 4501 Kansas Avenue Kansas City, KS 66106 Attention: President
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If to Kaw River:	Pat Cedeno COO Central Region Watco Transportation Services, Inc. 315 W. 3 <sup>rd</sup> Street Pittsburg, KS 66762
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15. Agreement To Be Construed Liberally Not For Benefit Of Third Parties. This agreement shall be construed liberally so as to secure to each party hereto all the rights, privileges and benefits herein provided or manifestly intended. This Agreement and each and every provision



hereof is for the exclusive benefit of the parties hereto and, except for KCT and the members of KCT's Owner's, not for the benefit of any other third party.

16. Successor and Assigns. This Agreement shall be binding upon and inure to the benefit of the respective successors, lessees and assigns of the parties hereto, provided however, Kaw River may not assign this Agreement to a third party without the written consent of KCT. Such consent shall not be unreasonably withheld if Kaw River assigns this Agreement to a responsible third party in connection with the merger of Kaw River into, or the sale of all or substantially all of its assets to, the assignee, but no assignment by Kaw River of this Agreement shall release Kaw River from its obligations hereunder.

17. Section Headings. All section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

18. General Provisions.

A. This Agreement shall be governed by and interpreted in accordance with the laws of Missouri.

B. Modifications or amendments to this Agreement must be in writing and executed by duly authorized representatives of each party.

C. Unless specifically stated to the contrary therein, indemnities against, releases from and limitations on liability expressed in this Agreement shall extend to the officers, directors, employees, agents, licensors and related entities of such party.

D. In the event that any portion or all of this Agreement is held to be void or unenforceable, the parties agree to negotiate in good faith to reach an equitable agreement which shall affect the intent of the parties as set forth in this Agreement.

E. The provisions of this Agreement which by their nature are intended to survive the termination, cancellation, completion or expiration of the Agreement, including, but not limited to, any indemnifications or expressed limitations of or releases from liability, shall continue as valid and enforceable obligations of the parties notwithstanding any such termination, cancellation, completion or expiration.

F. No failure by either party to insist on performance of any term, condition, or instruction, or to exercise any right or privilege included in this Agreement, and no waive of any breach shall constitute a waiver of any other or subsequent term, condition, instruction, breach, right or privilege.

G. The parties acknowledge and agree that the terms and conditions of this Agreement, including but not limited to those relating to allocations and assumptions of, releases from, exclusions against and limitations of liability, have been freely and fairly negotiated. Each party acknowledges that in executing this Agreement they have relied solely on their own judgment, belief, and knowledge, and such advice as they may have received from their own counsel, and they have not been influenced by any representation or statements made by any

other party or its counsel. No provision in this Agreement is to be interpreted for or against any party because that party or its counsel drafted such provision.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed as of the any and year first above written.

**THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.**

KANSAS CITY TRANSPORTATION  
COMPANY LLC

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

KAW RIVER RAILROAD, INC.

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT**  
**-Insurance Requirements-**

Contractor shall provide the following insurance coverages and shall otherwise comply with the following insurance provisions throughout the term of the Agreement:

1. Railroad General Liability insurance containing broad form contractual liability with a single limit of at least \$25,000,000.00 per occurrence or claim and an aggregate limit of at least \$30,000,000.00. Coverage must be purchased to include but not be limited to coverage for the following:
  - Bodily injury including death and personal injury
  - Property damage
  - Products and completed operations
2. Automobile Liability with the following limits:
  - a. Primary Bodily Injury with limits of \$1,000,000 per occurrence; and
  - b. Primary Property Damage Liability limits of \$1,000,000 per occurrence; or
  - c. Combined single limits of liability for Primary Bodily and Primary Property Damage of \$2,000,000 per occurrence.
3. Worker's Compensation Insurance with the limits established and required by the State of Missouri and the State of Kansas, if applicable.
4. Employer's Liability with limits of \$1,000,000 per occurrence, if applicable.

The Insurance required under 1 and 2 above shall cover the Contractor's contractual obligations (including, but not limited to, its indemnification obligations) under the foregoing Agreement

All Insurance required hereunder shall provide as follows:

*Additionally Insured:*

Kansas City Terminal Railway Company (KCT)  
Kansas City Transportation Company LLC

Prior to commencement of any work under the Agreement, CONTRACTOR shall furnish to KCTL a certificate of insurance showing that the required insurance coverage's are in place for CONTRACTOR and further providing that:

- a. KCTL and KCT are named an additional insured on the Railroad General Liability and the Automobile Liability insurance with respect to performance hereunder; and
- b. The coverage shall be primary and noncontributory as to any other insurance with respect to liability hereunder.
- c. Thirty (30) days prior written notice of cancellation or of material change in coverage be given to KCTL by endorsement.
- d. "Occurrence," as used herein, means any event or related exposure to conditions which result in bodily injury or property damage.
- e. Any deductibles or self-insured retentions must be declared to and approved by KCTL.